Supreme Court, U.S.
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NO. 99-1426

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL

Cross-Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia

BRIEF OF *AMICUS CURIAE* OF ALCAN ALUMINUM CORPORATION IN SUPPORT OF CROSS-PETITIONERS

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QUESTIONS PRESENTED

Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other that health effects relating to pollutants in the air," given that consideration of such factors would permit both Agency and reviewing courts to avoid confronting constitutional non-delegation issues.

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, Alcan Aluminum Corporation ("Alcan") is a subsidiary of Alcan Aluminum Limited, a Canadian Corporation. Alcan is engaged in the business of aluminum smelting and fabrication. It has major manufacturing facilities in the United States, which are subject to regulation by the Environmental Protection Agency as well as other federal agencies. It employs 4500 men and women and operates facilities in 13 States. Because of the substantial investment in operations in the United States, Alcan has a direct interest in insuring that the regulatory activities by federal agencies are predicted on a reliable basis to insure that the actions which Congress sought to achieve are in fact attained and that the regulated are not subjected to unnecessary costs which do not achieve the intended benefit.

SUMMARY OF ARGUMENT

Alcan believes that the manner in which present constitutional issue is framed by the lower court, presents an inescapable implication in the position of the United States Environmental Protection Agency ("EPA") that it is not required to, and in fact has not complied, with the reliability requirement for the promulgation of standards.

By taking the position that it is not obligated by the Clean Air Act to undertake a cost-benefit analysis, the EPA has implicitly conceded that it does not have the substantiation and has not undertaken the appropriate effort in the rulemaking process to comply with the reliability requirements of 42 USC §7607. This shortcoming is a two-prong failure. First, to properly evaluate

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief. Consent letters for all parties have been filed with this brief.

benefits, one must necessarily evaluate costs. Among the costs to be considered are not merely the costs of implementing the standards in terms of absolute dollars to the regulated, but the consequences of the standard's impact from a comprehensive standpoint to insure it does not result in changes of behavior of the regulated and the public such that any presumed reduction of risk from the standard is either negated or overall risk is enhanced.

The second part of the reliability requirement is to ensure that conclusions concerning risk associated with various limits on air standards complies with the requirements that this Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Before this Court resolves the constitutional issue presented unnecessarily, we urge this Court to consider a remand of this case for comprehensive review of the record to insure that the regulations at issue meet these reliability requirement.

ARGUMENT

I. A FEDERAL COURT SHOULD NOT RESOLVE A DISPUTE BY REACHING A CONSTITUTIONAL ISSUE WHEN THE CASE MAY BE RESOLVED ON ALTERNATIVE GROUNDS.

It is a well embedded principle that federal courts should not reach a constitutional issue if there is a non-constitutional ground for deciding the case. *See Gulf Oil Co. v. Bernard* 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Burton v. U.S.*, 196 U.S. 283,295 (1905); *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936).

II. THE STATUTORY SCHEME CLEARLY REQUIRES THE EPA TO CONSIDER CONSEQUENTIAL COSTS OF THE PROMULGATION OF AIR QUALITY CRITERIA.

The EPA paraphrases its obligation under the Clean Air Act to use "the latest scientific knowledge" to develop air quality criteria based on "all identifiable effects on public health or welfare." Petitioners Brief at 4. The EPA has apparently interpreted 42 U.S.C. 7408 to limit its consideration exclusively to the impact of the pollutant alone on health. The present dispute before this Court arises because the EPA has taken the position that the statute does not permit it to consider economic impact, feasibility or significance of the risk. However, the EPA's statutory obligation to evaluate "all identifiable effects on public health or welfare" is more comprehensive than the simple dose-response analysis conducted by the EPA.

The statute further defines what it means by "all identifiable effects" to include "those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant." 42 U.S.C. 7408 (a) (2) (A). This broad requirement imposes on the EPA the obligation to evaluate the totality of the consequences of its proposed regulatory efforts. Even if the EPA is correct that it is not obligated to consider the economic impact on the regulated entity as a factor in itself, to the extent that such impact translates into adverse impact on public health or welfare, such as making needed energy for heating, cooling or transportation practically unavailable to certain groups such a requirement is mandated.

It appears clear that the EPA has developed no reliable data to address this requirement. In fact, it does not even appear to have reliable data to demonstrate the likely consequences of the approach it has chosen on the simple dose-response issue as contrasted with the other alternative options available. Thus concludes Professor Cass R. Sunstein[2] who studied the record in depth that the final rules at issue are not accompanied by any

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[2] Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. Law REV. 303, 328 (1999).

quantification of the risks associated with competing standards. Nor is there an explanation of the basic value judgment showing what level of risk was chosen and why they are requisite to protect public health.

This Court should remand this case with instructions to the EPA to develop the record as required by 42 U.S.C. 7408 (a) (2) (A).

III. IT DOES NOT APPEAR THAT THE BASIS ON WHICH THE EPA PROMULGATED THE CHALLENGED REGULATIONS IS BASED ON RELIABLE EVIDENCE AS REQUIRED BY *DAUBERT*.

This case is an appropriate case for this Court to confirm that the *Daubert* standard which established the standard for "reliability" for expert testimony in federal court is also applicable to agency rule making. *Daubert* and its progeny ""establishes a standard of evidentiary *reliability*."[3] Commentators have recognized the logical relationship between the reliability standard for admissibility and the same requirement for federal agency action:

> ...The APA has express language that directly supports the application of the Supreme Court's *Daubert* Four. APA section 556(d) states that "sanction may not be imposed or rule or order issued except...[when] *supported by* and in accordance with *reliable*, probative and substantial evidence.[4]

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3 *Kumho Tire Co. . Carmichael,* 118 S.Ct. 1167, 1175 (quoting *Daubert,* 125 L. Ed. 2d. at 482*).* (emphasis added).

4 Charles D. Weller and David B. Graham, *New Approaches To Environmental Law and Agency Regulation: The Daubert Litigation Standard,* 30 ELR 10557, 10568 (2000). The authors argue that there is no plausible reason why *Daubert* should not be applied to all agency adjudication or rule making., at 10569. In fact courts have already imported *Daubert* into agency rule making. *See: Libas v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1998).

The Federal Appellate Courts have recognized that any deference to an agency is based on its status as an expert and as such its position must comport with expert behavior. *See*: *Chicago Board of Trade v. SEC,* 187 F.3d 713 (7th Cir. 1999) (stressing that agency must act like an expert to receive deference) and *Bechtel v.FCC,* 10 Fed 3rd. 875 (D.C. Cir. 1993) (agency action set aside when it failed to undertake the empirical analysis to support factual propositions).

Since the EPA did not attempt to quantify the risks, it is virtually impossible to determine why the agency chose the standards it adopted. Without specification of the range of benefits attainable from various approaches, "there is a weak role for sound science in standard setting".[5] It is impossible to evaluate the reliability of the agency rulemaking because it is impossible to discern the basis for the EPA judgments.

CONCLUSION

For the foregoing reasons, Alcan believes that the EPA has not established that its standards are rooted in sufficiently reliable evidence. Accordingly, the Court should vacate the EPA ozone and particulate standards on this basis and remand this case with instructions to the EPA to promulgate new standards based on the reliability standard articulated in *Daubert*.

Respectfully submitted,

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5 Sunstein, *supra.*, at p. 363